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The Criminalization of Bribery: Can the Foreign Corrupt Practices Act be Applicable to the Anti-Bribery Provisions of The United Nations Convention Against Corruption?

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THE CRIMINALIZATION OF BRIBERY: CAN THE FOREIGN CORRUPT PRACTICES ACT BE APPLICABLE TO THE ANTI-BRIBERY PROVISIONS OF THE UNITED NATIONS CONVENTION AGAINST CORRUPTION?

SARAH SHULMAN*

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I. INTRODUCTION

Bribery, most commonly defined as “the abuse of public office for private gain,”¹ is detrimental in both the public and the private sector.² In light of this, the tenets of the anti-bribery provisions of the

1. Ophelie Brunelle-Quraishi, *Assessing the Relevancy and Efficacy of the United Nations Convention Against Corruption: A Comparative Analysis*, 2 NOTRE DAME J. INT'L & COMP. L. 101, 111 (2011).

2. See Nancy Zucker Boswell, *An Emerging Consensus on Controlling Corruption*, 18 U. PA. J. INT'L ECON. L. 1165, 1165–66 (1997) (indicating the unacceptable cost of corruption to private sector earnings and public sector interests); Ryan J. Rohlfen, *Recent Developments in Foreign and Domestic Criminal Commercial Bribery Laws*, 2012 U. CHI. LEGAL F. 151, 151 (stating that

United Nations Convention Against Corruption (“UNCAC”) harshly condemn both public and private sector bribery.³ Though the Foreign Corrupt Practices Act (“FCPA”)—which serves as the primary instrument of the United States’ compliance with the anti-bribery provisions of the UNCAC—recently has undergone unprecedented expansion, it still fails to address the full spectrum of bribery that the UNCAC criminalizes.⁴ Despite being non-mandatory, the UNCAC’s provision prohibiting private sector bribery will have significant implications for the future of United States federal law and international law as a whole.

The United States has long acknowledged the issue of bribery in international business transactions as a serious threat.⁵ Recently, the international community as a whole has begun to recognize that bribery in international commercial transactions is an issue that deserves attention because of its far-reaching negative repercussions.⁶ Consequently, various multinational agreements have

bribery can take the form of corrupt payments between private parties and need not involve a public actor).

3. E.g., R. Rajesh Babu, *The United Nations Convention Against Corruption: A Critical Overview*, SOC. SCI. RESEARCH NETWORK 3 (Mar. 1, 2006).

4. See *Pilot Review Programme: United States of America*, U.N. OFFICE ON DRUGS AND CRIME 12 (Sept. 1, 2009), http://www.unodc.org/documents/treaties/UNCAC/PilotReview/USA_Final_Country_Report_UNCAC-PRP.pdf [hereinafter *U.N. Pilot Review Programme*] (noting that the FCPA established as a criminal offense the conduct described in UNCAC Article 16, the bribery of public foreign officials); see also United Nations Office on Drugs and Crime, *Response of the United States of America to the Comprehensive Self-Assessment Checklist*, U.S. DEP’T OF JUSTICE 47–48 (July 10, 2010), <http://www.justice.gov/criminal/fraud/fcpa/docs/USA-UNCAC-Self-Assessment.pdf> [hereinafter *USA UNCAC Self-Assessment*] (showing that, among the measures establishing the United States’ compliance with Article 21 (private sector bribery), the FCPA is not included as a relevant law).

5. See Amy Deen Westbrook, *Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act*, 45 GA. L. REV. 489, 501 (2011) (asserting that the United States was the first country to adopt anti-bribery legislation and that it remained the only country with anti-bribery prohibitions for twenty years after the passage of the FCPA); see also Thomas J. White, *U.S. Efforts to Combat Foreign Corrupt Practices*, 92 AM. SOC’Y INT’L L. PROC. 162, 163 (1998) (stating that the United States has criminalized bribery through the use of the FCPA since 1977).

6. See Michael B. Bixby, *The Lion Awakens: The Foreign Corrupt Practices Act—1977 to 2010*, 12 SAN DIEGO INT’L L.J. 89, 118 (2010) (reporting that there have been a series of anti-bribery and anti-corruption international agreements reached in the past decade); see also Brunelle-Quraishi, *supra* note 1, at 103

been created to address the problem of international commercial bribery.⁷ The UNCAC represents the most comprehensive and inclusive agreement created thus far.⁸

The United States has signed and ratified the UNCAC,⁹ which impresses various obligations related to corruption upon its signatories.¹⁰ Specifically, UNCAC Article 16(1) and Article 21 prohibit international commercial bribery in both the public and the private sector.¹¹ The FCPA is the United States' primary instrument for combating international commercial bribery;¹² it does not explicitly address private sector bribery, however, provoking the question of whether it can be used to address the spectrum of bribery incorporated by the UNCAC.¹³

This comment asserts that the scope of the FCPA has expanded through emerging enforcement trends toward application in the private sector; the applicability of the FCPA within the private sector, however, remains limited. Therefore, the FCPA does not

(acknowledging that the various international anti-corruption agreements that have been created in a short period of time imply that combating corruption has become an international priority).

7. See Bixby, *supra* note 6, at 92 (positing that the creation of significant anti-corruption international agreements within the past twenty years has influenced the way United States agencies enforce the FCPA).

8. See Brunelle-Quraishi, *supra* note 1, at 106 (describing the UNCAC as "the leading international anti-corruption tool"); see also Michael Kubiciel, *Core Criminal Law Provisions in the United Nations Convention Against Corruption*, 9 INT'L CRIM. L. REV. 139, 140 (2009) (stating that the UNCAC marks the peak of the anti-corruption movement within the international community).

9. Misty Robinson, *Global Approach to Anti-Bribery and Corruption, an Overview: Much Done, but a Lot More to Do*, 37 T. MARSHALL L. REV. 303, 314 (2012).

10. See Brunelle-Quraishi, *supra* note 1, at 102 (explaining that the UNCAC covers a spectrum of activities that fall within the "vast concept" of corruption); see also Robinson, *supra* note 9, at 308 (discussing the range of corruption criminalized by the UNCAC and the actions countries must take to prevent corruption).

11. See United Nations Convention Against Corruption arts. 16, 21, Oct. 31, 2003, 2349 U.N.T.S. 154, 156 [hereinafter UNCAC] (addressing the bribery of foreign public officials in Article 16 and bribery in the private sector in Article 21).

12. See Bixby, *supra* note 6, at 90 (stating that the FCPA occupies center stage in the United States' efforts to address white-collar crime).

13. Westbrook, *supra* note 5, at 494-95, 497 (asserting that the FCPA has been in use by the United States for a long time and has been greatly extended recently through new methods of enforcement).

comply with both anti-bribery provisions of the UNCAC. Part II of this comment will include background regarding the UNCAC and FCPA, as well as pertinent information regarding supplemental agreements that are of use to the present analysis. Part III argues that the United States does not meet the anti-bribery standards of the UNCAC because its federal anti-bribery provision, the FCPA, does not criminalize private sector bribery. Part IV will recommend ways that the United States can achieve full compliance with the UNCAC's anti-bribery obligations, such as by amending the FCPA or adopting new legislation specifically addressing private sector bribery. Finally, Part V concludes that the FCPA does not fulfill all of the United States' obligations under the UNCAC because it has not been used against purely private-to-private bribery, which UNCAC Article 21 prohibits.

II. BACKGROUND

A. THE UNITED NATIONS CONVENTION AGAINST CORRUPTION

The UNCAC's wide acceptance illustrates the global acknowledgement of corruption's destructiveness.¹⁴ The Ad Hoc Committee that carried out the negotiations for the United Nations Convention Against Transnational Organized Crime, which was adopted on November 15, 2000, was the first to propose the need for a convention specifically addressing corruption.¹⁵ Recognizing that corruption posed too complex an issue to be covered exhaustively by a convention dealing with transnational organized crime, the United

14. Brunelle-Quraishi, *supra* note 1, at 105–06 (finding that the international community has grown increasingly aware of the consequences of corruption and is eager to take action, as illustrated by the UNAC garnering 140 signatures and fifty ratifications within four months after it entered into force).

15. See Dimitri Vlassis, *The United Nations Convention Against Corruption Origins and Negotiation Process*, U.N. ASIA & FAR E. INST. FOR THE PREVENTION OF CRIME & THE TREATMENT OF OFFENDERS 127, http://www.unafei.or.jp/english/pdf/RS_No66/No66_16VE_Vlassis2.pdf (last visited Feb. 8, 2014) (stating that the question of a convention against corruption was first raised in connection with the negotiations for the U.N. Convention Against Transnational Organized Crime); Antonio Argandoña, *The United Nations Convention Against Corruption and Its Impact on International Companies*, 3 (Univ. of Navarra IESE Bus. Sch., Working Paper No. 656, 2006) (explaining that the United Nations decided that it was desirable to have an international legal instrument against corruption independent of the U.N. Convention Against Transnational Organized Crime).

Nations ("UN") eventually established the UNCAC.¹⁶ The Convention entered into force on December 14, 2005.¹⁷

The Convention has three stated purposes:

- (a) To promote and strengthen measures to prevent and combat corruption more efficiently and effectively; (b) To promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption, including in asset recovery; (c) To promote integrity, accountability and proper management of public affairs and public property.¹⁸

The goal of the UNCAC is to provide a comprehensive international instrument that establishes a common language and guidelines to unify international corruption legislation.¹⁹

The FCPA is the United States' domestic means of criminalizing bribery per the requirements of the UNCAC.²⁰ Compliance with the UNCAC is monitored through a system of peer review.²¹ The UNCAC assigns the responsibility of periodically reviewing the Member States' implementation of the UNCAC to the Conference of the State Parties to the Convention.²² Consequently, Poland and Sweden reviewed the United States in 2009.²³ Though the review did

16. Vlassis, *supra* note 15, at 127; *see also* Argandoña, *supra* note 15, at 3 (noting that the Ad Hoc Committee for the negotiation of the convention met for the first time in 2001 and held seven official sessions between 2002 and 2003 in Vienna).

17. *See* Robinson, *supra* note 9, at 307.

18. UNCAC, *supra* note 11, at 146.

19. *See* Argandoña, *supra* note 15, at 4 (recognizing that the approach of UNCAC toward unifying international corruption regulation is limited by the recognition of state sovereignty and numerous differences between State Parties, such as their various levels of economic development).

20. *See USA UNCAC Self-Assessment*, *supra* note 4, at 12 (identifying the FCPA as the applicable U.S. law implementing the measures described in Article 16(1)).

21. *See* Brunelle-Quraishi, *supra* note 1, at 136 (describing the UNCAC's peer review mechanism as a non-adversarial systematic examination and assessment of the performance of a state by other states which relies on mutual trust and a shared confidence in the process); Robinson, *supra* note 9, at 308 (stating that the UNCAC requires states to cooperate closely with each other in all aspects of the fight against corruption).

22. *See* UNCAC, *supra* note 11, at 151–52 (listing mechanisms for proper implementation of the UNCAC).

23. *U.N. Pilot Review Programme*, *supra* note 4, at 1.

not examine all UNCAC articles,²⁴ the review team identified the FCPA as a successful method of compliance with Article 16(1).²⁵

The UNCAC as a whole has a wide scope; this comment, however, will focus primarily on the UNCAC's criminalization of bribery in international business transactions by Articles 16(1) and 21.²⁶ Article 16 "Bribery of Foreign Public Officials and Officials of Public International Organizations" states,

Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the promise, offering or giving to a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business.²⁷

The UNCAC defines a foreign public official as "any person holding a legislative, executive, administrative or judicial office of a foreign country, whether appointed or elected; and any person exercising a public function for a foreign country, including for a public agency or public enterprise."²⁸ Article 16(1) is a mandatory provision while Article 21 is non-mandatory.²⁹

In an effort to compromise between the United States' objections to criminalizing bribery in the private sector and Europe's desire to prohibit bribery in the private sector, the parties to the negotiation

24. *See id.* at 2 (stating the review examined the following articles: "5 (preventative anti-corruption policies and practices); 15 (bribery of national public officials); 16 (bribery of foreign public officials and officials of public international organizations); 17 (embezzlement, misappropriation or other diversion of property by a public official); 25 (obstruction of justice); 46 (mutual legal assistance) . . . and 53 (measures for direct recovery of property)").

25. *Id.* at 12–13 (stating that the FCPA is sufficient to bring the United States into compliance with the requirements of UNCAC Article 16(1)).

26. *See Robinson, supra* note 9, at 307–08 (observing that the UNCAC concerns the prevention of corruption in its member countries' public and private sectors and also calls for the investigation and prosecution of corruption).

27. UNCAC, *supra* note 11, at 154.

28. *Id.* at 147.

29. Kubiciel, *supra* note 8, at 141 (stating that although several articles of the UNCAC are non-mandatory provisions, the UNCAC makes certain core provisions mandatory).

process made Article 21 non-mandatory.³⁰ Article 21 “Bribery in the Private Sector” states,

Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally in the course of economic, financial or commercial activities: (a) The promise, offering or giving, directly or indirectly, of an undue advantage to any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting; (b) The solicitation or acceptance, directly or indirectly, of an undue advantage by any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting.³¹

No supplementary official or semi-official commentary to the UNCAC exists.³²

B. THE FCPA: THE UNITED STATES’ DOMESTIC METHOD OF COMPLIANCE WITH THE UNCAC’S ANTI-BRIBERY PROVISIONS

Congress enacted the FCPA in 1977.³³ The law prohibits any issuer, domestic concern, or any person from “mak[ing] use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value.”³⁴ To constitute an offence under the FCPA, these acts must be directed to “any foreign official,” “any foreign political party or official thereof or any candidate for foreign political office,” or “any person, while

30. See Brunelle-Quraishi, *supra* note 1, at 115 (discussing the contentions between the United States and the EU during the Convention negotiations regarding the inclusion of a private-sector bribery prohibition within the UNCAC).

31. UNCAC, *supra* note 11, at 156.

32. See Kubiciel, *supra* note 8, at 139 (discussing that without an official or semi-official commentary concerning the content of the UNCAC it is difficult for Member States to implement the provisions).

33. See Bixby, *supra* note 6, at 92–93 (explaining that the Watergate scandal was a driving force behind the FCPA’s enactment in 1977; investigations into illegal accounts and illicit payments connected to the Nixon campaign led to the conclusion that the rash of illegal and illicit payments could be curbed if legislation could punish companies that disguised bribes in their books).

34. Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1(a) (1998).

knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office.”³⁵ The FCPA defines a foreign official as

any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any public international organization.³⁶

Additionally, the bribe must have one of the following purposes:

(A)(i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or (B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality, in order to assist . . . in obtaining or retaining business for or with, or directing business to, any person.³⁷

The Securities and Exchange Commission (“SEC”) or the Department of Justice (“DOJ”) must prove the above-stated elements to determine whether bribery has occurred.³⁸

When enacted, the primary objective of the Act was to target illicit bribes made by United States firms to foreign officials.³⁹ As the global environment changed, however, the FCPA had to adapt.⁴⁰ Consequently, the Act has been amended twice, once in 1988 and again in 1998.⁴¹ The United States has pursued violations of the

35. *Id.* § 78dd-1(a)(1)–(3).

36. *Id.* § 78dd-1(f)(1)(A).

37. *Id.* § 78dd-1(a)(3)(A)–(B).

38. *See* Bixby, *supra* note 6, at 94 (noting that the FCPA contains a list of requirements that the SEC and DOJ must meet to prove bribery has occurred).

39. *Id.* at 93.

40. *See* Brunelle-Quraishi, *supra* note 1, at 105 (stating that the UNCAC is a product of a heightened consciousness of corruption as a growing threat).

41. Bixby, *supra* note 6, at 97, 101 (discussing how the 1998 amendments broadened the scope of the FCPA to cover any individual who could be considered an agent of a corporation or any official, regardless of governmental level, in a foreign nation).

FCPA, both criminally and civilly, for incidents of bribery within international business transactions.⁴² The FCPA's successful structure has been used as a model and motivation for the international community to address the problem of corruption.⁴³

C. THE ORGANISATION FOR ECONOMIC CO-OPERATION AND
DEVELOPMENT CONVENTION ON COMBATING BRIBERY OF
FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS
TRANSACTIONS: ASSESSING THE UNITED STATES' USE OF THE
FCPA

The Organisation for Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("OECD Convention") closely parallels the approach of the FCPA.⁴⁴ It was created under strong pressure from the United States due to the United States' desire to encourage the criminalization of bribery in international business transactions.⁴⁵ The OECD Convention is narrowly tailored to specifically address international commercial bribery of foreign public officials⁴⁶ and represents the first multilateral agreement to criminalize bribery.⁴⁷ The OECD Convention entered into force in

42. See Robinson, *supra* note 9, at 314 (observing that, in recent years, the SEC and DOJ have widely enforced the FCPA against violations that affect or concern the United States).

43. See Abiola Makinwa, *The Rules Regulating Transnational Bribery Achieving a Common Standard?*, 2007 INT'L BUS. L.J. 17, 18–19 (arguing that the FCPA is "the cornerstone upon which the . . . international anti-corruption framework has been built").

44. *Id.* at 26 (observing that of all anti-corruption instruments, the OECD Convention follows most closely the approach of the FCPA); White, *supra* note 5, at 163 (stating that the United States was very involved in the OECD Convention's negotiations and gave important input to the administration throughout the negotiation process).

45. Philippa Webb, *The United Nations Convention Against Corruption: Global Achievement or Missed Opportunity?*, 8 J. INT'L ECON. L. 191, 195–96 (2005).

46. See Robinson, *supra* note 9, at 306 (stating that the OECD Convention criminalizes the bribery of foreign public officials in international commercial transactions and requires parties to the Convention to: (1) adhere to the Convention's interpretation of the "bribery of a foreign public officer," (2) promote international cooperation, and (3) enforce the anticorruption legislation).

47. See White, *supra* note 5, at 163 (recognizing that the OECD Convention was unprecedented in the way it criminalized bribery of foreign public officials, including payments to officials of public agencies, public enterprises, and public

1999.⁴⁸

The OECD Convention states,

Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.⁴⁹

The OECD Convention defines a foreign official as “any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organisation.”⁵⁰

The monitoring mechanism of the OECD Convention has conducted extensive assessment of U.S. compliance under the FCPA.⁵¹ The results of such monitoring provide a thorough analysis of the FCPA and identify divergent areas between the FCPA and the OECD.⁵²

international organizations).

48. *E.g.*, Webb, *supra* note 45, at 195.

49. Organization for Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and Related Documents, art. 1, May 23, 1997, 37 I.L.M. 1 (1998), available at http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf.

50. *Id.* art. 1(4)(a).

51. See Robinson, *supra* note 9, at 306 (describing how the OECD has incorporated compliance measures entailing annual peer-review monitoring, which evaluates the adequacy of a country’s legislation to implement the Convention, assesses whether a country is applying the legislation effectively, and focuses on enforcement of the Convention and any outstanding recommendations); see also *Phase One Report on Implementing the OECD Anti-Bribery Convention in the United States*, ORG. FOR ECON. CO-OPERATION & DEV. 1 (Apr. 1999), <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/2390377.pdf> [hereinafter *OECD Phase One Report*] (stating that the United States signed the OECD Convention on December 17, 1997, ratified it on November 10, 1998, and deposited its instrument of ratification with the OECD on December 8, 1998).

52. See Bixby, *supra* note 6, at 100 (stating that upon the establishment of the OECD Convention, the United States amended the FCPA to properly align the FCPA with the OECD Convention).

The OECD Convention strives to use domestic law to combat the bribery of foreign public officials.⁵³ An assessment of the United States' compliance with its obligations under the UNCAC will demonstrate that the FCPA's expansiveness—which is greater than that of the OECD Convention—is indicative of the FCPA's increasing scope.⁵⁴

D. THE VIENNA CONVENTION ON THE LAW OF TREATIES:
INTERPRETING THE UNCAC

The Vienna Convention on the Law of Treaties (“Vienna Convention”)—which entered into force on January 27, 1980⁵⁵—offers guidelines with which to interpret the UNCAC and the obligations it imposes. The increasing importance of treaties as a source of international law and as a means of developing peaceful cooperation among nations provided the impetus for a common standard to interpret all international treaties.⁵⁶ Article 31 of the Vienna Convention states, “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”⁵⁷ An analysis of the FCPA under this provision will determine whether the FCPA fulfills the United States' anti-bribery obligations under the UNCAC.

53. See Webb, *supra* note 45, at 195–96 (discussing the importance of the OECD Convention as an innovative effort to guide the anticorruption activities of governments that influence the flow of most of the world's investments, trades, and goods).

54. See *OECD Phase One Report*, *supra* note 51, at 1 (stating that the newly amended FCPA is the domestic legislation used by the United States to fulfill the requirements of the OECD Convention); *Phase Three Report on Implementing the OECD Anti-Bribery Convention in the United States*, ORG. FOR ECON. CO-OPERATION & DEV. 27–28 (Oct. 10, 2010), <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/UnitedStatesphase3reportEN.pdf> [hereinafter *OECD Phase Three Report*] (noting that while it is unclear whether the scope of the FCPA definition of “foreign public official” includes a person exercising a public function for a public enterprise or applies in cases where a benefit is directed to a third party by a foreign official, U.S. courts and agencies are inclined to interpret the term expansively).

55. Vienna Convention on the Law of Treaties, pmbl., May 23, 1969, 1155 U.N.T.S. 331, 332–33 [hereinafter Vienna Convention].

56. *Id.*

57. *Id.* art. 31.

E. UNITED KINGDOM BRIBERY ACT

Other nations have enacted FCPA-comparable anti-bribery legislation that prohibits bribery of foreign public officials, while simultaneously surpassing the FCPA by prohibiting private sector bribery as well: the United Kingdom is one such nation.⁵⁸ The United Kingdom Bribery Act (“UK Bribery Act”) entered into force on July 1, 2011.⁵⁹ The UK Bribery Act criminalizes a wide spectrum of bribery, ranging from the bribery of a foreign official⁶⁰ to the bribery of any other person without distinguishing between the public and private sector, stating:

(1) A person (“P”) is guilty of an offence if . . . (a) P offers, promises or gives a financial or other advantage to another person, and (b) P intends the advantage – (i) to induce a person to perform improperly a relevant function or activity, or (ii) to reward a person for the improper performance of such a function or activity.⁶¹

Additionally, the UK Bribery Act expands corporate liability for bribery in international business transactions by allocating liability to the corporation for the actions taken by an actor associated with the corporation. Section seven of the UK Bribery Act states,

[a] relevant commercial organisation (“C”) is guilty of an offence under this section if a person (“A”) associated with C bribes another person intending—(a) to obtain or retain business for C, or (b) to obtain or retain

58. See discussion *infra* Part III.C (comparing the UK Bribery Act and the FCPA).

59. See Press Release, Ministry of Justice, UK Clamps Down on Corruption with New Bribery Act (Mar. 30, 2011), *available at* <https://www.gov.uk/government/news/uk-clamps-down-on-corruption-with-new-bribery-act> (asserting that the United Kingdom will reinforce its reputation as a leader in the global fight against corruption when the Bribery Act enters into force on July 1, 2011).

60. Bribery Act § 6, c. 23 (2010) (stating that a person who bribes a foreign public official (“F”) is guilty of an offense if that person’s intention is to influence F in F’s capacity as a foreign public official).

61. *Id.* § 1; see also Lee G. Dunst et al., *Hot Off the Press: Resetting the Global Anti-Corruption Thermostat to the UK Bribery Act*, 12 BUS. L. INT’L 257, 278 (2011) (clarifying that the provision against private bribery differs from the provision against the bribery of a foreign public official by stating that “the financial advantage must induce the person to perform a relevant function or activity *improperly* or reward the person for such improper performance, or the payer must know or believe that accepting the advantage would itself constitute improper performance of the relevant function or activity”).

an advantage in the conduct of business for C.⁶²

This provision is not limited to the bribery of a foreign public official and could reach the overseas actions of foreign persons associated with a British company, thereby vastly widening the scope of the UK Bribery Act.⁶³

The extensive scope of the UK Bribery Act encompasses the offense of bribing another person, the offense of being bribed, and the organizational offense of failing to prevent bribery.⁶⁴ The implementation of the UK Bribery Act has brought the United Kingdom into compliance with its international treaty obligations.⁶⁵

III. ANALYSIS

This section first discusses the Vienna Convention as the standard under which to interpret the UNCAC. Second, this section asserts that the FCPA does not meet the UNCAC's Article 21 anti-bribery provision through a textual interpretation of the respective documents and how they are, and are not, similar. This section will then consider the issue through a more theoretical approach, concluding that, in its application, the FCPA nears compliance in a limited capacity with UNCAC Article 21. Third, it argues that the antiquity of the FCPA prevents it from meeting the broader purpose of the UNCAC and compares the FCPA against the 2010 United Kingdom Bribery Act. Finally, this section assesses the UNCAC negotiations to determine their implications for the United States' dogmatic perspective regarding anti-bribery legislation.

62. Bribery Act § 7.

63. See Jacqueline L. Bonneau, Note, *Combating Foreign Bribery: Legislative Reform in the United Kingdom and Prospects for Increased Global Enforcement*, 49 COLUM. J. TRANSNAT'L L. 365, 390 (2011) (expressing that the language of Section 7 of the UK Bribery Act "would potentially cover new actors and expand the scope of British jurisdiction beyond that envisioned by the American regime").

64. See Dunst et al., *supra* note 61, at 277 (setting forth the additional offenses proscribed by the UK Bribery Act in addition to the offense of bribing a foreign official).

65. See Bonneau, *supra* note 63, at 400 (asserting that the UK Bribery Act is a vast improvement in British anti-bribery law, specifying that the addition of the offense for foreign bribery brings the United Kingdom into compliance with its international treaty obligations).

A. ANALYSIS OF THE UNCAC UNDER THE VIENNA CONVENTION
ON THE LAW OF TREATIES

In interpreting the UNCAC as it applies to the United States, the Vienna Convention dictates that the UNCAC be read in accordance with its ordinary meaning as well as the overall context and goals of the Convention.⁶⁶ Although the United States is not an official signatory of the Vienna Convention, it considers the Vienna Convention instructive.⁶⁷ Therefore, an assessment of the United States' obligations under the UNCAC must go beyond the black-letter text of the Convention and consider the purpose of the UNCAC.⁶⁸ Both the UNCAC and the FCPA share a similar objective, to combat bribery; the text of the UNCAC, however, is more expansive than that of the FCPA.⁶⁹

B. ALTHOUGH THE OBJECTIVES OF THE UNCAC AND FCPA ARE
COMPARABLE, THE UNCAC ACKNOWLEDGES ACTS OF BRIBERY
THAT ARE BEYOND THE SCOPE OF THE FCPA

The precedent of United States predominance in combating international bribery in commercial transactions is being replaced by

66. See Vienna Convention, *supra* note 55, art. 31 (stating that not only must a treaty be interpreted in “good faith” and in conformance with its “ordinary meaning,” but it must be understood according to its purpose and context—which includes its preamble and annexes—as well as subsequent agreements and practices in application).

67. See *Vienna Convention on the Law of Treaties*, U.S. DEP’T STATE, <http://www.state.gov/s/l/treaty/faqs/70139.htm> (last visited July 28, 2013) (stating that though the United States has not signed the Vienna Convention on the Law of Treaties, it considers many of the provisions to constitute customary international law).

68. See *id.* (requiring that the interpretation of a treaty must include any agreement and instrument made in connection with the creation of the treaty, before or after its conclusion, and that special meaning should be given to certain terms of the treaty if the parties so intended).

69. See Ben W. Heineman, Jr. & Fritz Heimann, *The Long War Against Corruption*, 85 FOREIGN AFF. 75, 80 (2006) (explaining that the UNCAC created a “global framework for combating corruption”); see also Barbara Crutchfield George et al., *On the Threshold of the Adoption of Global Antibribery Legislation: A Critical Analysis of Current Domestic and International Efforts Toward the Reduction of Business Corruption*, 32 VAND. J. TRANSNAT’L L. 1, 5 (1999) (affirming that the FCPA combats bribery by being the first legislation worldwide that criminalizes the bribery by business entities as opposed to criminalizing the acceptance of bribes by government officials).

the innovative progression of the international community.⁷⁰ The primary objective of the FCPA when it was instituted as the United States' primary mechanism for addressing the problem of international bribery was to combat illicit bribes made by United States firms to foreign officials.⁷¹ Alternatively, the UNCAC has created a new precedent for anti-bribery legislation by instigating the possibility of making bribery in the private sector a criminal offense.⁷² Although the UNCAC does not make the prohibition of private sector bribery mandatory—preventing the United States from being in violation of its UNCAC obligations—the provision remains important because its inclusion within the UNCAC contributes to the overall objective of the Convention and signals a shift in international law.⁷³ Despite being non-mandatory, Article 21 will have significant implications for the future of the United States' federal policy regarding bribery in international commercial transactions.⁷⁴

First, this section evaluates the plain meaning of the FCPA to determine whether, based solely on the Act's language, the FCPA satisfies Article 16(1) and Article 21 of the UNCAC, respectively. Next, this section will take a theoretical approach, interpreting whether the application of the FCPA expands its scope to satisfy the

70. See *OECD Phase Three Report*, *supra* note 54, at 50 (commending the U.S. government for its visible and high level of support for the fight against bribery of foreign officials); see also *U.N. Pilot Review Programme*, *supra* note 4, at 12 (stating that the FCPA is "reported to be a significant priority" for the DOJ); Robinson, *supra* note 9, at 314 (explaining that U.S. enforcement agencies have received praise for their frequent initiation of such international cooperation in deterring foreign bribery).

71. See generally Bixby, *supra* note 6, at 93 (discussing the purpose and two primary provisions of the FCPA when it was first enacted).

72. See Argandoña, *supra* note 15, at 7 (stating that the UNCAC has incorporated this possibility in Article 21).

73. See UNCAC, *supra* note 11, art. 19 (mandating that "[e]ach State Party shall consider adopting" legislation prohibiting private sector bribery); Boswell, *supra* note 2, at 1166 (stating that the issue of corruption has become a priority in international law, politically and economically, because of a combination of interests regarding corruption in the public and private sectors in many countries); discussion *infra* Part III.D (discussing the emerging international consensus on the need to prohibit private sector bribery in international commercial transactions as illustrated by the UNCAC negotiations).

74. See discussion *infra* Part III.B.2–3 (examining the way in which the U.S. policy regarding the use of the FCPA is already expanding beyond the scope of foreign public officials).

anti-bribery provisions of the UNCAC. Finally, after concluding that the FCPA fails to incorporate both anti-bribery provisions of the UNCAC, this section argues that the FCPA's expansive scope, demonstrated by its application against public enterprises and resulting from the blurring lines between the private and public sectors, may indicate further compliance with the UNCAC than a textual reading might suggest.

1. A Strictly Textual Assessment Reveals that the FCPA Does Not Prohibit the Full Scope of Bribery Addressed within the UNCAC

The provision addressing bribery of foreign public officials within the UNCAC is based on the language of similar agreements that have come before it.⁷⁵ This premise is illustrated by the comparable components of Article 16(1) and the FCPA.⁷⁶ The scope of the FCPA encompasses the prohibitions of Article 16(1), thereby satisfying one aspect of the anti-bribery initiative the UNCAC seeks to address.⁷⁷

A *prima facie* comparison of the UNCAC Article 16(1) and the FCPA reveals the compatibility of the two provisions.⁷⁸ First, both provisions require similar actions to constitute the offense of bribery of a foreign public official.⁷⁹ Second, the requisite purposes of the

75. See Indira Carr, *The United Nations Convention on Corruption: Making a Real Difference to the Quality of Life of Millions?*, 34 MANCHESTER J. INT'L ECON. L., no. 3, 2006, at 3, 20 (stating that this offense is found in Article 16 of the UNCAC and that, in drafting it, the UNCAC "mimic[ked] . . . the language found in other anti-corruption conventions").

76. See Makinwa, *supra* note 43, at 25 (asserting that transnational bribery rules have a number of elements in common).

77. See *U.N. Pilot Review Programme*, *supra* note 4, at 12 (stating that the FCPA complies with UNCAC Article 16(1) by criminalizing the conduct described within Article 16(1)).

78. See *USA UNCAC Self-Assessment*, *supra* note 4, at 16 (stating that the text of the FCPA sufficiently establishes the provisions of Article 16(1) as a criminal offense).

79. Compare UNCAC, *supra* note 11, art. 16(1) (requiring an act of promising, offering, or giving to constitute bribery), and Brunelle-Quraishi, *supra* note 1, at 111 (stating that the UNCAC specifically criminalizes the "offering, giving, promising, acceptance, and solicitation of any 'undue advantage'"), with Foreign Corrupt Practices Act § 78dd-1(a), 15 U.S.C. § 78dd-1(a)(1) (1998) (listing similar conduct, such as an offer, payment, promise to pay, or authorization of the payment of any money, as acts of bribery), and *OECD Phase One Report*, *supra* note 51, at 3 (asserting that the FCPA requirement to offer, promise, or give proof of an act in furtherance establishes that the defendant committed himself to

bribe in order to constitute an offense are comparable in both the FCPA and the UNCAC Article 16(1).⁸⁰ Third, both provisions use the same language to identify the recipient of the bribe.⁸¹ While there exists some discrepancy in the language because of the UNCAC's direct prohibition of the bribery of an official of a public international organization, the FCPA definition of a foreign official encompasses any officer or employee of a public international organization, thereby satisfying all elements of UNCAC Article 16(1).⁸² Finally, both provisions include a safeguard, requiring intent in order for liability for the offense of bribery of a foreign public official to exist.⁸³ A textual comparison of UNCAC Article 16(1) and the FCPA shows that the FCPA meets the obligations created by Article 16(1).⁸⁴

doing the act and thereafter performed some act to accomplish the objective).

80. Compare UNCAC, *supra* note 11, art. 16(1) (requiring that the act of bribery by an official be to intentionally obtain or retain business or other undue advantage in relation to the conduct of international business, as long as the official acts or refrains from acting in the exercise of his or her official duties), and *U.N. Pilot Review Programme*, *supra* note 4, at 12, with 15 U.S.C. § 78dd-1(a)(1)(A)–(B) (necessitating that the purpose of the bribe be to influence a foreign official in his official capacity or to secure an undue advantage), and *OECD Phase One Report*, *supra* note 51, at 3 (stating that the two categories of improper benefits prohibited by the FCPA are the offer, payment, promise to pay, or authorization of the payment of any money and the offer, gift, promise to give, or authorization of the giving of anything of value).

81. Compare UNCAC, *supra* note 11, art. 16 (requiring the act of bribery to be directed at a “foreign public official or an official of a public international organization . . . for the official himself or herself or another person or entity”), with 15 U.S.C. § 78dd-1(1)–(3) (necessitating that these actions be directed to any foreign official, any foreign political party or official thereof, or any candidate for foreign political office, or other person, knowing that the payment to that other person would be passed on to a foreign official, foreign political party or official thereof or candidate for foreign political office).

82. See *OECD Phase One Report*, *supra* note 51, at 6 (expanding on the definition of “foreign official” to include “any officer or employee of a ‘political international organization’” or a third person acting in an official capacity on behalf of such an organization).

83. See UNCAC, *supra* note 11, art. 15 (stating that under provisions of the UNCAC, bribery is considered an offense when committed intentionally); 15 U.S.C. § 78dd-1(a) (requiring the impetus for the bribe to be corruption); *OECD Phase One Report*, *supra* note 51, at 2 (clarifying that by requiring corrupt intent, the FCPA prohibits all payments to foreign officials “regardless of whether that official would have acted or not acted without the payment being made”).

84. See *U.N. Pilot Review Programme*, *supra* note 4, at 13 (“The U.S. has adopted the measures required in accordance with UNCAC Article 16(1).”).

A surface reading of the FCPA indicates that the Act only prohibits bribery in the public sector and therefore does not address the private sector bribery restriction of UNCAC Article 21.⁸⁵ The FCPA's limited provisions distinguish it from the UNCAC, which criminalizes bribery in the private sector in addition to the public sector.⁸⁶ In contrast to Article 16(1), Article 21 prohibits the bribery of any person and does not require association with a foreign public official to establish liability.⁸⁷ Conversely, the FCPA does not recognize the bribery of just any person as an offense.⁸⁸ Thus, a strictly textual reading of the FCPA prompts the conclusion that the FCPA does not fulfill both tenets of the UNCAC's anti-bribery regime.

2. The Application of the FCPA Implies that the FCPA Nearly Encompasses the Form of Bribery Recognized by Article 21, yet Fails to Fully Incorporate the Actions Prohibited by UNCAC Article 21

The application of the FCPA indicates that the doctrine has a wider scope than its language would suggest. The FCPA's original purpose was to address bribery of foreign officials, completely satisfying the UNCAC's Article 16 prohibition against the bribery of foreign public officials.⁸⁹ While the U.S. government did not enact the FCPA with the intent to address bribery in the private sector, the increasing global attention towards private sector bribery has corresponded with the broadening scope of the FCPA.⁹⁰

85. See Bixby, *supra* note 6, at 94 (stating that the anti-bribery provisions of the FCPA are meant to deter corporations from using bribery to influence their business with officials of foreign nations).

86. See UNCAC, *supra* note 11, art. 21 (prohibiting bribery in the private sector by making it a criminal offense).

87. See *id.* art. 21(a) (criminalizing the promise, offering, soliciting or acceptance, or giving, directly or indirectly, of an undue advantage to any person).

88. See 15 U.S.C. § 78dd-1(a)(1)–(3) (prohibiting the direct or indirect bribery of a foreign official or foreign political party).

89. See Robinson, *supra* note 9, at 311 (listing Congress' purposes for enacting the FCPA as "to prohibit bribery of foreign officials and to promote fair business practices, integrity, and accountability and the efficient and equitable distribution of economic resources").

90. See *id.* at 310 (reporting that in 2011 the Bribe Index looked at business-to-business bribery for the first time and found that companies are almost as likely to pay bribes to other businesses as they are to public officials).

The DOJ and SEC have exaggerated extensively the already-expansive view of the FCPA's requisite elements in recent FCPA actions.⁹¹ The FCPA has consistently been applied extraterritorially, provided that the act in question triggers further acts to occur in the United States.⁹² Additionally, an expansive aspect of the FCPA is that it prohibits the offer of a bribe; therefore, no affirmative action is needed to violate the FCPA.⁹³ In the last few years, however, the interpretation of the FCPA has become significantly more extensive.⁹⁴ The conclusion of the most recent OECD Phase Report underscores this expansion, explaining that the FCPA has become broader than the purely "anti-bribery directed towards public foreign official" scope of the OECD Convention because the FCPA has been used against persons not considered public officials under the OECD Convention.⁹⁵ The recent evolution of the applicability of the FCPA, expanding the scope of the Act, has signaled stronger U.S. conformity with UNCAC Article 21's prohibition of private sector bribery.⁹⁶

The FCPA does not have a clearly defined boundary; rather, the FCPA can be interpreted to have a narrow scope that only applies to payments that are made in order to obtain a foreign official's

91. See Westbrook, *supra* note 5, at 530 (stating that although the DOJ and SEC typically have taken a very broad view of the provisions of the FCPA in the past, the enforcement agencies have become even more expansive in their interpretation of the FCPA recently).

92. See Carolyn Lindsey, *More than you Bargained For: Successor Liability Under the U.S. Foreign Corrupt Practices Act*, 35 OHIO N.U. L. REV. 959, 962 (discussing the far-reaching jurisdiction of the FCPA, in that "arguably the authorization of a wire transfer intended to pay a bribe that hits a U.S. bank account is enough to put a foreign company under the territorial jurisdiction of the FCPA").

93. See *id.* (arguing that money or a gift does not actually need to change hands to constitute a bribe in violation of the FCPA, and that just an offer suffices as a violation).

94. See Westbrook, *supra* note 5, at 530 (discussing how the expansion of FCPA enforcement has gone as far as the SEC using FCPA authority to apply existing laws in "novel and creative ways," consequently "broadening the scope of liability for the regulated community," which some consider "hyper aggressive").

95. See *OECD Phase Three*, *supra* note 54, at 27 (stating that whether the FCPA covers a person exercising a public function for a foreign country or a public enterprise must be determined in order to clarify the definition of a foreign public official).

96. See Westbrook, *supra* note 5, at 494 (asserting that the "relatively recent radicalization" of FCPA enforcement has changed the substance of the law).

approval regarding international business transactions.⁹⁷ However, a broader reading of the FCPA, to cover payments that indirectly help the person offering the bribe to obtain or retain foreign business, provides a more accurate interpretation.⁹⁸ The FCPA continuously has received liberal application, largely by attributing a pliable definition to the term “foreign official” as the instrument of evolution towards the FCPA’s application in the private sector and, consequently, compliance with UNCAC Article 21.⁹⁹

The primary method of expanding the application of the FCPA to bribery in the private sector as encompassed by UNCAC Article 21 is the increasing use of the FCPA against public enterprises.¹⁰⁰ The term “instrumentality” within the definition of a public official has been interpreted broadly to bring public enterprises within the purview of the FCPA.¹⁰¹ The inclusion of public enterprises within the scope of the FCPA illustrates U.S. deference to UNCAC Article 21 by bringing entities not directly employed by the government within the jurisdiction of the FCPA.¹⁰² The United States justifies the

97. Makinwa, *supra* note 43, at 19.

98. See *id.* at 19 (suggesting that the most likely result of the debate regarding the scope of the FCPA, caused by the somewhat ambiguous language of the act, is that the act should be widely interpreted); see also Bixby, *supra* note 6, at 100–01 (stating that the 1998 amendment of the FCPA significantly expanded the reach of the act by including “any individual who could be considered an agent of a corporation or any official, regardless of governmental level, in a foreign nation” under the purview of the FCPA).

99. See Westbrook, *supra* note 5, at 531 (suggesting that the definition of a “foreign official” as used in the FCPA is arguably “the most contentious point of FCPA interpretation”).

100. See *OECD Phase Three Report*, *supra* note 54, at 28 (stating that since the last Report there have been positive legal developments regarding the application of the FCPA against the bribery of a person exercising a public function for a public enterprise).

101. See Westbrook, *supra* note 5, at 533 (stating that the DOJ has regularly indicated that it takes a more expansive view of the “agency or instrumentality” component of the FCPA to encompass quasi-governmental bodies and consideration of the “role performed by the entity or the government’s influence”).

102. Compare *OECD Phase One Report*, *supra* note 51, at 6 (noting that the FCPA’s definition of foreign official does not reference public enterprises, nor are public enterprises mentioned in the act itself), and *OECD Phase Three Report*, *supra* note 54, at 28 (identifying the lack of official determination as to whether the definition of a foreign public official covers a person exercising a public function for a foreign country, including for a public enterprise), with *OECD Phase One Report*, *supra* note 51, at 6 (explaining that public enterprises incorporate employees of instrumentalities of foreign governments as being

inclusion of public enterprises by asserting that Congress expressly intended to include state-owned enterprises and the employees of those enterprises in the definition of a foreign official.¹⁰³ The expansive amount of businesses now considered foreign officials due to the interpretation of the term “instrumentality” resembles the prohibition of private bribery in UNCAC Article 21 because transactions between businesses exercising primarily private functions are now susceptible to FCPA enforcement.¹⁰⁴

The second significant factor behind the expansion towards FCPA application in the private sector is the blurring of the line between the two sectors.¹⁰⁵ Many countries have seen increasing government involvement within the alleged private sector for various reasons, such as the nature of the respective governments or in response to a need generated by the current state of the economy.¹⁰⁶ The resulting

foreign officials and that this provision covers officers, directors, and employees of state enterprises), and Westbrook, *supra* note 5, at 535 (stating that the term “instrumentality” has been interpreted to include state-owned or controlled enterprises, making employees of such enterprises foreign officials for the purposes of the FCPA).

103. *OECD Phase Three Report*, *supra* note 54, at 28.

104. *See OECD Phase One Report*, *supra* note 51, at 6 (discussing the factors the DOJ considers in categorizing an entity as a public enterprise, including the characterization of the enterprise and its employees, “the purpose of the enterprise,” and “the degree of control exercised over the enterprise by the foreign government;” the DOJ has qualified a vast amount of businesses, and consequently their employees, as being controlled or owned by foreign governments, resulting in their treatment as instrumentalities of the foreign government). *But see* Kubiciel, *supra* note 8, at 151 (stating that the UNCAC’s goal of broad criminalization is accomplished through including “both public officials by statute and those by function” in its definition of a foreign public official); Brunelle-Quraishi, *supra* note 1, at 112 (explaining that the concept of a foreign official as used by the UNCAC encompasses a wide array of categories and that the interpretation of a foreign official under the UNCAC will be left to the discretion of each Member State).

105. *See* Webb, *supra* note 45, at 212 (declaring that a reason behind the global recognition of the problem of private sector corruption is the line between the public and private sector being blurred by privatization and outsourcing); Brunelle-Quraishi, *supra* note 1, at 109 (explaining that regional instruments have begun including private sector corruption because the line between the public and private sector is becoming increasingly blurred, accrediting this trend to outsourcing and the rapid growth of the private sector in some countries); Babu, *supra* note 3, at 18 (affirming that the line between the two sectors is blurred by privatization, outsourcing and other developments).

106. For example, due to the pervasive presence of the Chinese government in

vulnerability of entities outside the traditional concept of a public foreign official, as represented by UNCAC Article 16(1), to FCPA litigation brings the FCPA closer to accommodating the private bribery provision of UNCAC Article 21 but ultimately fails to fully incorporate the provision.¹⁰⁷

3. *The Extensive Scope of the FCPA Is Illustrated by Case Law*

Recent cases demonstrate how the FCPA has expanded in a way that implies a growing U.S. conformity with the larger scope of anti-bribery objectives of the UNCAC, manifested by Article 21. In 2008, Nam Quoc Nguyen pled guilty to violating the FCPA by bribing employees of a Vietnamese government-owned company.¹⁰⁸ Nguyen was the founder and President of Nexus Technologies, which exported a wide variety of equipment and technology to its customers in Vietnam.¹⁰⁹ The company obtained business by paying bribes to rig bids and receive confidential information.¹¹⁰ For purposes of the FCPA, the bribes were being paid to foreign officials because Vietnamese government agencies controlled Nexus

the private sector, entities of the socialized medical system—including nurses, lab technicians, and family members of employees—have been considered foreign officials. Additionally, the global stimulus plan has resulted in the categorization of many large companies as foreign officials for the purposes of the FCPA due to governmental assistance, such as the Royal Bank of Scotland, which is now 68.4% owned by the UK government. Furthermore, the rise in cross-border investments—many governmentally-controlled—in companies during the economic crises will result in the inclusion of those companies within the FCPA definition of foreign officials, such as the Singapore Investment Corporation, which is now closely connected with the Singaporean government. *See Westbrook, supra* note 5, at 534–35 (stating that recent cases have exhibited an unprecedented expansion of the definition of foreign official).

107. *See Bixby, supra* note 6, at 91 (noting that “whenever U.S. business crosses a border, an FCPA investigation is now a distinct possibility”).

108. *E.g.*, Guilty Plea Agreement at 1–2, *United States v. Nguyen*, No. 08-522-1 (E.D. Pa. June 29, 2009) (stating the specific charges to which the defendant, Nam Quoc Nguyen, was pleading guilty).

109. *See* Indictment at 2, *United States v. Nguyen*, No. 08-522-1 (E.D. Pa. Sept. 4, 2008) (specifying that the company exported underwater mapping equipment, bomb containment equipment, helicopter parts, chemical detectors, satellite communication parts, and air tracking systems).

110. *See id.* at 6 (explaining that the manner and means of the conspiracy included the defendant paying bribes to a Hong Kong Company which then funneled the funds to Vietnamese government officials as a way to obtain lucrative contracts).

Technology customers.¹¹¹

This case reflects a shift towards a more expansive interpretation of the FCPA, nearing the incorporation of Article 21 of the UNCAC, because the U.S. government held companies and their employees exercising private functions liable under the FCPA.¹¹² The United States justifies this expansion by asserting that a public purpose is only one of many factors used to determine if an organization is an agency or instrumentality of a foreign government and claiming that Congress intended to include employees of state-owned enterprises in the definition of a foreign official.¹¹³ The U.S. government's rationalization of the use of the FCPA, although an unprecedented expansion of its scope, implicitly acknowledges that a doctrine focused solely on public officials will no longer adequately deter bribery in international business transactions.¹¹⁴ While *U.S. v. Nam Quoc Nguyen* reflects a positive United States policy shift towards addressing bribery in the private sector, this shift leaves many unsuspecting companies vulnerable to litigation due to the unprecedented expansion of FCPA application.¹¹⁵

Another example of an FCPA case that illustrates the FCPA's

111. See *id.* at 3–4 (discussing the various government entities involved: Vung Tau Airport and Southern Flight Management Center, controlled by the Ministry of Transport; Viestovpetro Joint Venture and Petro Vietnam Gas Company, controlled by the Ministry of Industry; and Tourism and Trading Company, controlled by Vietnam's Ministry of Public Safety. The Hong Kong Company was used to facilitate the payments of bribes to and for the benefit of Vietnamese government officials; therefore, these companies and their employees were departments, agencies, or instrumentalities of the Government of Vietnam and, consequently, foreign officials).

112. See *OECD Phase Three Report*, *supra* note 54, at 28 (stating that the defendants argued that they could not be held liable under the FCPA because the definition of a foreign official does not include employees of a state owned enterprise and that for an organization to be considered an agency or instrumentality of a foreign government, it must serve a "purely public purpose").

113. See *id.* (discussing the response of the U.S. government to the defendants' argument, rationalizing the extension of the definition of an agency or instrumentality in order for the FCPA to apply to the claim).

114. See *id.* (presenting the United States' response to the defendants' challenges against the use of the FCPA when involving employees of state-owned enterprises in the case of *Nam Quoc Nguyen*).

115. See *Indictment*, *supra* note 109, at 6 (stating that defendants paid bribes to Vietnamese "government officials," referring to agents of companies owned in part by the Vietnamese government).

expansion into the private sector is *U.S. v. Kellogg Brown & Root*. In 2009, Kellogg Brown & Root (“KBR”) pled guilty to conspiring to violate the FCPA.¹¹⁶ KBR executives allegedly bribed Nigeria LNG Limited (“NLNG”), a company created to develop the Bonny Island Project and award all related contracts.¹¹⁷ The Nigerian government controlled forty-nine percent of NLNG.¹¹⁸ This case is significant because it demonstrates the increasing use of the FCPA within largely non-governmental businesses sectors. Though the government was not a dominating influence over NLNG, it owned the entity that controlled a portion of NLNG shares.¹¹⁹ There existed minimal government involvement in both *U.S. v. Kellogg Brown & Root* and *U.S. v. Nam Quoc Nguyen*, indicating a shift in the application of the FCPA towards the private sector and addressing the actions prohibited by Article 21 of the UNCAC.¹²⁰

C. IMPLICATION OF THE UNCAC: THE FCPA IS AN ANTIQUATED DOCUMENT, AS ILLUSTRATED BY THE UNITED KINGDOM BRIBERY ACT

The globalized nature of today’s market enhances the potential for corruption and bribery.¹²¹ Additionally, the increasing prevalence of

116. See Plea Agreement at 2, *United States v. Kellogg Brown & Root LLC*, No. H-09-071 (S.D. Tex. Feb. 11, 2009) (stating that the defendant agreed to waive indictment and plead guilty to a five count criminal information); Bixby, *supra* note 6, at 131 (explaining that Kellogg Brown & Root pleaded guilty to one count of conspiring to violate the FCPA and four counts of violating the anti-bribery provisions of the FCPA); Information at 9, *United States v. Kellogg Brown & Root LLC*, No. H-09-071 (S.D. Tex. Feb. 9, 2009) (reporting that count one is the conspiracy to violate the FCPA).

117. Plea Agreement, *supra* note 116, at 39.

118. See *id.* at 38–39 (describing that the Nigerian National Petroleum Corporation was a Nigerian government-owned company and was the largest shareholder of NLNG; the U.S. government alleged that the Nigerian government controlled NLNG through appointment of board members).

119. See Westbrook, *supra* note 5, at 533 (affirming that a Nigerian government-owned entity owned forty-nine percent of NLNG).

120. See Plea Agreement, *supra* note 116, at 7–9 (explaining that KBR participated in a scheme to bribe employees of NLNG, a company whose largest shareholder at forty-nine percent is a government-owned corporation); Indictment, *supra* note 109, at 3–6 (communicating that the defendant is charged with bribing employees of companies over which the Vietnamese government exercised control).

121. See George et al., *supra* note 69, at 25 (discussing how “in today’s world, goods, ideas and capital move across national borders with ease” and nations at

government intervention in the economy correlates with increasing occurrences of corrupt business practices.¹²² This trend of corrupt business practices propagates the belief that bribery is an inevitable aspect of doing business.¹²³ Because the nature of today's economy makes it beneficial for corporations to engage in corrupt business practices, multilateral conventions such as the UNCAC are needed to counteract the norm of corruption.¹²⁴ As an accepted aspect of international business for many years, bribery has caused negative repercussions spanning various industries.¹²⁵

The United States was the first country to recognize international corruption as harmful;¹²⁶ today, it is widely recognized that the negative consequences of corruption, such as distorting markets, breeding cynicism among citizens, and undermining the rule of law, must be prevented and corruption eliminated.¹²⁷ The international community as a whole must resist bribery in international business transactions, though the practice remains deeply rooted in the very nature of the market.¹²⁸ While corruption in general always impedes

varying stages of development are interacting with each other to foster an environment of corruption); Vlassis, *supra* note 15, at 126 (stating that the "problem of corruption is systematic rather than individual" and that in today's economy, since "only a very small number of companies are practically able to carry out the work, the ground is fertile for corrupt practices").

122. Patrick X. Delaney, *Transnational Corruption: Regulation Across Borders*, 47 VA. J. INT'L L. 413, 421 (2007) (stating that theorists have suggested that "where government intervention in the economy is high, the scope of corruption increases").

123. *See id.* at 423 (explaining that businesses located in developing countries are more likely to contribute to the spread of corruption "by assuming pay-offs and connections are inevitable facts of doing business").

124. *See Babu, supra* note 3, at 2 (discussing how the system of international trade was conducive to corruption, the practice being seen as "quite normal and legal" in most countries).

125. *See id.* at 1 (suggesting that international corruption not only impedes the government's ability to provide services to its citizens, but also jeopardizes the development of a country).

126. *See George et al., supra* note 69, at 3–4 (indicating that the FCPA was the first of its kind in the realm of international bribery law).

127. Heineman & Heimann, *supra* note 69, at 76.

128. *See Vlassis, supra* note 15, at 126 (positing that bribery has detrimental effects in both developing and developed countries); George et al., *supra* note 69, at 9 (stating that the shifting attitude towards international corruption in business has been caused, in part, by an awareness "brought about by the globalization of business and security transactions, that the economic costs of corruption are too high").

economic development, private sector bribery specifically is problematic and must be monitored.¹²⁹ Therefore, a multilateral agreement such as the UNCAC is crucial in the movement to deter bribery in international business transactions;¹³⁰ in order to impart the changes necessary to cure the deficiencies caused by bribery, however, the UNCAC must be fully supported by all of its signatories.

United States federal law will not encompass the full scope of the UNCAC anti-bribery provisions until the United States shares in the goals of the Convention.¹³¹ Globalization has created problems that must be addressed on a supranational, rather than national, scale, leading to varying values on private sector bribery.¹³² The increasing reliance on multilateral treaty instruments for addressing serious international problems will not motivate the United States to alter the FCPA to satisfy the anti-bribery criminalization provisions of the UNCAC as long as the United States refuses to take a global approach to the criminalization of bribery.¹³³

The United States commitment to the FCPA restricts the United States from accepting and implementing international treaty

129. See Boswell, *supra* note 2, at 1165–66 (suggesting that the costs of corruption go beyond the common capital loss, namely, undermining democracy, threatening effective development, and jeopardizing free market values); Rohlfen, *supra* note 2, at 152–53 (listing several repercussions of corruption); UNCAC, *supra* note 11, pmb. (stating “that corruption is no longer a local matter but a transnational phenomenon that affects all societies and economies, making international co-operation to prevent and control it essential”).

130. See generally Babu, *supra* note 3, at 2 (stating that in recent years, since corruption in international business transactions has begun receiving global attention, there has been an unprecedented effort to adopt international anti-corruption instruments within a relatively short period of time).

131. See Webb, *supra* note 45, at 226 (suggesting that the UNCAC will be successful when its signatories share its values).

132. See Delaney, *supra* note 122, at 423 (citing Anne-Marie Slaughter’s suggestion that although “globalization has brought about a raft of problems that can only be addressed on a global scale” there is still resistance against the attempt to locate power above the state); see also Heineman & Heimann, *supra* note 69, at 82 (stating that although it is a difficult task, the importance of creating a worldwide anticorruption framework justifies the efforts).

133. See generally Shirley V. Scott, *The Political Interpretation of Multilateral Treaties: Reconciling Text with Political Reality*, 5 N.Z. J. PUB. & INT’L L. 103, 104 (2007) (“The international community has come to rely on the multilateral treaty instrument for addressing some of its most serious problems.”).

provisions that are clearly beyond the boundary of the original goals of the FCPA, such as private-to-private bribery.¹³⁴ As the first Act to criminalize bribery in international commercial transactions, the FCPA proved an influential factor in establishing the structure of subsequent multilateral anti-bribery agreements.¹³⁵ Given the FCPA's history of influence, the United States is reluctant to acknowledge its inadequacies and cede its influence in favor of a more global perspective.¹³⁶ The FCPA cannot satisfy the bribery provisions of the UNCAC. Furthermore, the U.S. government's commitment to the original conception of the FCPA prevents the FCPA from becoming the modern domestic legislation needed by the United States to satisfy the anti-bribery obligations of the UNCAC.¹³⁷ Due to the United States' refusal to allow the FCPA to progress enough to meet modern requirements—such as the need to address private sector bribery—the FCPA does not fully meet the standard set by the UNCAC anti-bribery provisions.¹³⁸

The United Kingdom, in order to update its anti-bribery regime, has passed the UK Bribery Act.¹³⁹ The UK Bribery Act is the United Kingdom's effort to stay abreast of international developments regarding corruption in international business transactions.¹⁴⁰ In

134. See Heineman & Heimann, *supra* note 69, at 85 (suggesting that each country will have to overcome its long-standing internal cultural problems in order to improve the enforcement of its anticorruption legislation and make the global anticorruption movement more likely to succeed).

135. See George et al., *supra* note 69, at 18 (arguing that the FCPA has served as an important model for other multilateral organizations and nations in creating their own anticorruption laws).

136. See Robinson, *supra* note 9, at 305 (describing the FCPA as the very first national legislation targeting international corruption and explaining how the FCPA has had global influence).

137. See Webb, *supra* note 45, at 222–23 (theorizing that governments comply with treaties because they are committed to the ideas embodied in the treaty, not because they expect a reward for their compliance).

138. See *id.* at 213 (stating that the United States resisted the desire of the European Union, Latin America, and the Caribbean during the UNCAC negotiations to incorporate a provision criminalizing private sector bribery).

139. Bonneau, *supra* note 63, at 384 (observing that, in response to international criticism and in recognition of its confusing and outdated anti-bribery regime, the British government launched a complete legislative overhaul which ultimately resulted in the UK Bribery Act).

140. See Dunst et al., *supra* note 61, at 261–62 (stating that the Bribery Act is the latest anti-corruption legislation attempting to comply with the globalized standard).

updating its legislation, the United Kingdom has gone further than the FCPA, reaching a wider range of corrupt conduct.¹⁴¹

The nature and purpose of the UK Bribery Act, being parallel to that of the FCPA, lends itself to a comparison with the FCPA.¹⁴² While comparable to the FCPA in certain respects, the UK Bribery Act reflects the growing trend to move beyond the FCPA in favor of implementing more comprehensive anti-bribery legislation.¹⁴³ The UK Bribery Act has created new theories of liability for the international criminalization of foreign bribery.¹⁴⁴

The UK Bribery Act criminalizes the bribery of foreign officials, as the FCPA does.¹⁴⁵ The language of the provision is reflective of the FCPA, as both require the same elements for the offense of bribery of a foreign official.¹⁴⁶ The UK Bribery Act is more comprehensive than the FCPA, however, due to its broader scope and its encompassing of the criminalization of purely private-to-private bribery.¹⁴⁷ The UK Bribery Act surpasses its American counterpart by prohibiting private bribery between businessmen that occurs both domestically and overseas.¹⁴⁸

141. See Bonneau, *supra* note 63, at 388–89 (discussing the uncertainty surrounding the UK Bribery Act and its application since it reaches more conduct than the FCPA).

142. See *id.* at 386 (asserting that the Bribery Act is an example of the export of the FCPA model abroad); Dunst et al., *supra* note 61, at 278 (stating that the Bribery Act, unlike the FCPA, “extends its reach to bribes made in the private sector, both domestically and abroad”).

143. See Bonneau, *supra* note 63, at 395 (arguing that the United State’s FCPA had long been a model for international criminalization of foreign bribery, but that some countries like the United Kingdom have begun to move beyond the FCPA).

144. See *id.* at 395–96 (stating that the United Kingdom’s anti-bribery laws create new theories of liability).

145. See Dunst et al., *supra* note 61, at 263 (stating that the Bribery Act’s provision against bribing foreign officials provides a direct analogue to the FCPA’s anti-bribery provisions); Bonneau, *supra* note 63, at 386 (observing that the Bribery Act established a discrete offense of bribery of foreign public officials).

146. Bonneau, *supra* note 63, at 386 (showing that the UK Bribery Act lists the elements established by the FCPA for the offense of bribery of a foreign public official).

147. See *id.* at 391 (suggesting that the UK Bribery Act represents a more comprehensive approach to the prevention of bribery than the FCPA and also may extend the British extraterritorial jurisdictional reach beyond that of the FCPA).

148. See *id.* (stating that the Bribery Act extends jurisdiction and criminalizes bribery outside of the foreign official context).

The UK Bribery Act serves as an example that anti-bribery provisions can encompass both public and private sector bribery. Conversely, the UK Bribery Act has received criticism for its ambiguous language, a criticism shared by the FCPA.¹⁴⁹ In an effort to clarify the ambiguity, the Ministry of Justice released guidelines that have, in effect, undermined the innovative features of the UK Bribery Act by suggesting that it will not be strictly enforced.¹⁵⁰ The ultimate effects of the UK Bribery Act are yet to be seen; regardless of its limits, however, by including a provision addressing private sector bribery, the UK Bribery Act marks advancement in anti-bribery legislation yet to be reached by the United States.¹⁵¹ These differences will ultimately affect the impact of the UK Bribery Act.¹⁵² A comparison between the UK Bribery Act and the FCPA demonstrates the inability of the FCPA to apply fully in the private sector without the inclusion of language targeted at strictly-private sector bribery, thus definitively restricting United States incorporation of the UNCAC private sector bribery prohibitions of Article 21.¹⁵³

D. THE NEGOTIATION OF THE UNCAC SIGNALS THE UNITED STATES' UNWILLINGNESS TO STRAY FROM THE STRUCTURE OF THE FCPA, THEREBY PREVENTING FULL INCORPORATION OF THE SCOPE OF THE UNCAC ANTI-BRIBERY PROVISIONS

Including a provision against bribery in the private sector proved one of the most contentious issues during the UNCAC

149. *See id.* at 401 (asserting that the UK Bribery Act has the “same problem with ambiguity” as the FCPA).

150. *See id.* at 403 (suggesting that, in an attempt to respond to the fears of British corporations that they would be subjected to “draconian enforcement” of the new Bribery Act, these guidelines make clear that the act was not designed to “bring the full force of criminal law to bear upon well run commercial organisations that experience an isolated incident of bribery on their behalf”).

151. *See* Dunst et al., *supra* note 61, at 262 (conveying that the UK Bribery Act, in addition to outlawing bribery of foreign public officials, features much broader anti-bribery restrictions than the FCPA—namely, extending liability to bribes perpetrated in a private, commercial setting).

152. *See id.* (predicting that the UK Bribery Act’s impact on multinational corporations will largely depend on how the Act differs from the FCPA, which is the incumbent anti-corruption regime for the multinational corporate community).

153. *See* Bribery Act § 1, c. 23 (2010) (criminalizing private sector bribery by including a provision specifically prohibiting the bribery of “another person”).

negotiations.¹⁵⁴ The strong desire of the European Union (“EU”) and the Latin American and Caribbean States to criminalize bribery in the private sector was met with staunch objections from the United States.¹⁵⁵ The concern that limiting the scope of the Convention would adversely affect its implementation did not deter the United States from protesting the inclusion of a provision that, textually, was blatantly different from the FCPA.¹⁵⁶

The lack of U.S. domestic legislation addressing the issue of purely private sector bribery, though an issue of global concern, prevented the United States from supporting the provision.¹⁵⁷ The United States’ opposition to what is now Article 21 appeared contradictory to its previous leading role in promoting the establishment of multilateral anti-bribery agreements.¹⁵⁸ The United States claimed that a provision criminalizing purely private sector bribery could put United States citizens at risk for lawsuits in foreign courts and therefore would not be supported by the United States.¹⁵⁹ The United States’ protection of the private sector leaves no room for advancement beyond the confines of the public foreign officials language of the FCPA.¹⁶⁰ The dogmatic approach taken by the

154. Webb, *supra* note 45, at 213.

155. See *id.* at 213 (stating that the EU led the campaign to criminalize bribery in the private sector and was supported by the Latin American and Caribbean States); Brunelle-Quraishi, *supra* note 1, at 115.

156. See Webb, *supra* note 45, at 213 (stating that during the negotiations, the representatives in support of including private sector bribery in the convention argued that adopting a limited approach that only targeted the public sector would “adversely affect the implementation of the future convention”).

157. See *id.* (stating that, in opposing the inclusion of the prohibition of private sector bribery, the U.S. representative explained that private sector bribery was not a crime in the United States); Babu, *supra* note 3, at 31 (asserting that while the text of the UNCAC makes it clear that private sector corruption is a major global concern, the provision on corruption in purely private conducts was “watered-down” in order to obtain passage).

158. See Webb, *supra* note 45, at 213 (observing that the United States’ position is surprising given that the United States was the leader in the movement against international bribery).

159. See Brunelle-Quraishi, *supra* note 1, at 115 (arguing that the United States forcefully opposed a provision that criminalized bribery in purely private contexts because it feared the potential ramifications of lawsuits against U.S. citizens in foreign courts).

160. See Babu, *supra* note 3, at 31 (suggesting that, because of the protective approach taken by the developed countries towards the private sector, the provision on criminalizing purely private conduct was made non-mandatory in order to

United States towards the FCPA limits the United States' ability to implement progressive provisions of multilateral agreements that recognize the need to prohibit bribery outside of the realm of public foreign officials.¹⁶¹

The disagreements during the negotiations, which reached no consensus, indicate the improbability of U.S. federal law fully encompassing the UNCAC's anti-bribery provisions.¹⁶² In order to settle this dispute, the parties reached a compromise that incorporated a provision criminalizing private sector bribery within the UNCAC, made non-mandatory to appease the United States.¹⁶³ The United States will not satisfy the non-mandatory provision criminalizing private sector bribery until it is willing to alter its domestic legislation.

IV. RECOMMENDATIONS

Many experts agree that bribery "remains a routine business practice for too many companies and runs throughout their business dealings, not just those with public officials."¹⁶⁴ UNCAC Article 21 has acknowledged and codified the emerging problem of bribery in the private sector.¹⁶⁵ The FCPA, however, fails to fully address the prohibitions of Article 21; therefore, the United States must take additional measures to incorporate the complete set of UNCAC anti-

increase the chance of passage).

161. See Webb, *supra* note 45, at 213–14 (stating that the FCPA only applies to bribes paid abroad in private-to-public contexts rather than private-to-private transactions).

162. See Vlassis, *supra* note 15, at 129 (arguing that for a provision of a multilateral agreement to be effective, the international community must sustain efforts to attain consensus).

163. See Brunelle-Quraishi, *supra* note 1, at 115 (reiterating that, due to the disagreement over private sector bribery, a compromise was struck that criminalized private-to-private corruption; however, the provision was not made mandatory); Webb, *supra* note 45, at 214 (stating that U.S. views ultimately prevailed, given that the provision on criminalizing bribery in the private sector was made non-mandatory).

164. Robinson, *supra* note 9, at 321–22 (quoting Huguette Labelle, the Chair of the Board of Directors of Transparency International).

165. See Brunelle-Quraishi, *supra* note 1, at 109 (discussing the inclusion of private sector bribery prohibitions in the UNCAC and asserting that the similarity of the public and private sector prohibitions reflect the "gradual convergence of both sectors").

bribery provisions. The domestic legislation of any UNCAC signatory should criminalize bribery in order to comply fully with UNCAC Article 21.¹⁶⁶

A. THE UNITED STATES SHOULD AMEND ITS LEGISLATION

The United States can take various measures to address its failure to incorporate the anti-bribery prohibition of UNCAC Article 21 within federal legislation. One option is to incorporate compliance with the UNCAC through the FCPA. U.S. enforcement agencies could further extend the application of the FCPA and apply the Act within the purely-private sector.¹⁶⁷ An updated set of guidelines, which would serve to notify businesses that the FCPA will apply in an extended amount of circumstances, would allow businesses to implement internal procedures to avoid potential FCPA actions. Additionally, the United States could amend the FCPA to formally expand its scope and make it applicable to private sector bribery.¹⁶⁸ The FCPA previously has been amended in order to adjust to contemporary standards.¹⁶⁹ Amending the FCPA in response to the increasing global concern regarding private sector bribery would not represent a drastic shift away from FCPA precedent.¹⁷⁰

B. THE UNITED NATIONS SHOULD MAKE CHANGES TO THE UNCAC TO INCREASE COMPLIANCE WITH ITS BRIBERY PROVISIONS

The UNCAC also could compel United States' compliance with its anti-bribery provisions by making Article 21 mandatory or

166. UNCAC, *supra* note 11, at 19 (articulating that each state party shall consider criminalizing bribery in the private sector).

167. See Westbrook, *supra* note 5, at 494–95 (suggesting that the scope of the FCPA has already expanded to some extent through enforcement).

168. See *id.* at 502 (discussing how FCPA amendments have twice been utilized to clarify and strengthen the FCPA's provisions).

169. See Bixby, *supra* note 6, at 97–98 (discussing the origins of the 1998 amendment and explaining that in 1977 when the FCPA was first enacted the United States was the only country with such a prohibition, though as time went on the world economy and the international attitude towards corruption changed, prompting the FCPA to adapt).

170. See generally Brunelle-Quraishi, *supra* note 1, at 109 (arguing that, given the growth of the private sector in some countries and the growing influence of multinational corporations, “it would have been negligent to refuse to criminalize corruption in both sectors”).

enforcing sanctions on noncompliance. By making Article 21 non-mandatory, signatories such as the United States are less likely to implement those prohibitions into domestic law.¹⁷¹ By failing to incorporate a standard level of compliance obligations throughout the UNCAC, the complexity of the convention increases.¹⁷² That complexity increases the likelihood that the UNCAC will create diversity in national anti-corruption legislation rather than uniformity.¹⁷³ Additionally, the UNCAC does not impose sanctions on its members for non-compliance.¹⁷⁴ The possibility of sanctions would motivate the United States to bring its laws into compliance with the UNCAC's anti-bribery provisions in order to avoid any future sanctions.

C. ALTERNATIVE MODES THE UNITED STATES MAY PURSUE TO
INCREASE ITS COMPLIANCE WITH THE UNCAC BRIBERY
PROVISIONS

Additionally, the United States may adopt legislation specifically addressing the issue of private sector bribery as prohibited by UNCAC Article 21. The non-self-executing nature of many of the UNCAC's provisions, including Article 21, requires implementation through the national laws of participating countries.¹⁷⁵ The United States may implement an original piece of legislation into domestic law to criminalize private sector bribery. Alternatively, the United States may adopt pre-existing international agreements that require signatories to prohibit private sector bribery in international business

171. See Makinwa, *supra* note 43, at 35 (arguing that a permissive provision may lead to uncertainties in regulating international corruption).

172. Lucinda A. Low, *The Awakening Giant of Anticorruption Enforcement*, STEPTOE & JOHNSON LLP 4 (May 4, 2006), <http://www.steptoel.com/assets/attachments/2599.pdf> (explaining that the UNCAC has over a dozen different levels of implementation obligations for State Parties, ranging from hard or mandatory obligations to very soft obligations, and that these variants increase the complexity of any analysis of the UNCAC).

173. See *id.* at 5 (arguing that the complexity of UNCAC implementation obligations will create an even more diverse spectrum of national obligations).

174. See Brunelle-Quraishi, *supra* note 1, at 140 (noting that the UNCAC does not have any provisions on sanctions and does not penalize its members for non-compliance).

175. See Low, *supra* note 172, at 4 (stating that many of the provisions of the UNCAC are not self-executing and "require implementation through the national laws of participating countries, as well as national enforcement").

transactions. One such international agreement that would resolve the discrepancy between the anti-bribery provisions of the UNCAC and United States law is the International Institute for the Unification of Private Law (“UNIDROIT”) Principles of International Commercial Contracts (“UNIDROIT Principles”).¹⁷⁶ The UNIDROIT Principles proscribe bribery in any international business transaction, not limiting its scope to the public sector.¹⁷⁷ By implementing new provisions dealing specifically with private sector bribery, the United States would fully incorporate the purpose of the UNCAC anti-bribery provisions within federal law.

V. CONCLUSION

The FCPA is no longer an adequate doctrine that the United States should use to meet modern international law standards regarding bribery in international business transactions. The UNCAC strives to create “global anticorruption standards and obligations.”¹⁷⁸ An agreement, however, is only as effective as the enforcement efforts by its members.¹⁷⁹ The FCPA, as the United States’ primary anticorruption enforcement instrument, increasingly has been utilized to combat bribery.¹⁸⁰ The United States has pushed the boundaries of

176. *UNIDROIT Principles of International Commercial Contracts*, INT’L INST. FOR UNIFICATION PRIVATE L. art. 3.3.1 (2010), available at <http://www.unidroit.org/english/principles/contracts/principles2010/integralversion/principles2010-e.pdf> (“(1) Where a contract infringes a mandatory rule, whether of national, international or supranational origin, applicable under Article 1.4 of these Principles, the effects of that infringement upon the contract are the effects, if any, expressly prescribed by that mandatory rule. (2) Where the mandatory rule does not expressly prescribe the effects of an infringement upon a contract, the parties have the right to exercise such remedies under the contract as in the circumstances are reasonable.”).

177. See *id.* art. 3.3.1 (using general language to prohibit the infringement of a contract under any mandatory rule whether national, international, or supranational).

178. Brunelle-Quraishi, *supra* note 1, at 106.

179. See Robinson, *supra* note 9, at 309 (positing that the effectiveness of conventions is dependent upon a state’s willingness to alter the behavior of its society).

180. See, Bixby, *supra* note 6, at 90 (discussing the FCPA’s evolution into becoming the United States’ foremost instrument for combating white-collar crime); Robinson, *supra* note 9, at 305 (stating that the United States prompted the international combat of corruption by enacting the FCPA, nationally criminalizing foreign bribery).

the FCPA by applying it well beyond the context of bribery of foreign public officials; consequently, the FCPA verges on applicability against private sector bribery concurrent with Article 21 of the UNCAC.¹⁸¹ The tension between the language of the FCPA and the increasing need for its application within the private sector has created uncertainty that chills legitimate business investments.¹⁸²

Although the scope of the FCPA has expanded significantly, the Act is inefficient in meeting the purpose of the UNCAC embodied in the Convention's anti-bribery provisions, specifically the private sector bribery prohibition of Article 21.¹⁸³ The private sector bribery provision of the UNCAC represents an enduring trend in international law.¹⁸⁴ The FCPA is no longer an adequate doctrine to address bribery in international business transactions because of its limitations relating to the private sector.¹⁸⁵ If the United States wants to remain a leader in the effort to combat international corruption, it must make formal changes to bring itself in line with the new international law standards transcribed in the UNCAC Article 21 private sector bribery prohibition.¹⁸⁶ Until the U.S. government ceases using the FCPA as a limiting factor to U.S. anti-corruption policy, the United States will continue to fall behind in the sphere of international anti-bribery efforts, which renders it impossible for the United States to fully meet the UNCAC's criminalization of

181. See Westbrook, *supra* note 5, at 494 (noting that because of a recent radicalization of FCPA enforcement, which has altered the substantive law, a number of companies have been prosecuted under the FCPA).

182. See Bonneau, *supra* note 63, at 394 (explaining that companies complained that the FCPA created uncertainty that could jeopardize legitimate business investment and put them at a disadvantage against competitors in countries where anti-bribery statutes were not as strict).

183. See *id.* at 380 (stating that the broadening scope of liability will significantly affect the regulated community).

184. See Robinson, *supra* note 9, at 303–04 (asserting that other countries besides the United States have become more aggressive in their anti-corruption laws and enforcement, not only within their own boundaries, but also globally).

185. See Dunst, *supra* note 61, at 286 (stating that the FCPA no longer leads the worldwide anti-corruption enforcement effort due to the enactment of more advanced legislation by other countries, i.e. the UK Bribery Act).

186. See Bonneau, *supra* note 63, at 396 (arguing that if the United States would like to remain a leader in the field of international anti-corruption, it must consider the possibility of amending the FCPA to bring it more in line with new international standards).

international bribery standards.¹⁸⁷

187. See Makinwa, *supra* note 43, at 34–36 (discussing how the liberal model of regulation does not motivate countries to alter their pre-existing legislation but allows countries to participate at the level of requirement of their particular legal, social, and political conditions).